

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

PAUL STEPHEN SALAS,

Petitioner,

vs.

No. CIV 21-0209 JB/DLM

VINCENT HORTON, Warden, and RAÚL  
TORREZ, Attorney General for the State of  
New Mexico,

Respondents.

**MEMORANDUM OPINION AND ORDER ADOPTING THE MAGISTRATE JUDGE'S  
PROPOSED FINDINGS AND RECOMMENDED DISPOSITION**

**THIS MATTER** comes before the Court on: (i) the Magistrate Judge's Proposed Findings and Recommended Disposition, filed January 31, 2024. (Doc. 25)("PFRD"); and (ii) the Petitioner's Objections to Proposed Findings and Recommended Disposition, filed March 25, 2024 (Doc. 29)("Objections"). In the PFRD, the Honorable Damian L. Martínez, United States Magistrate Judge for the United States District Court for the District of New Mexico, concludes that Petitioner Paul Stephen Salas' Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody, filed March 10, 2021 (Doc. 1), is time-barred and recommends that the Court dismiss with prejudice the petition as untimely. See PFRD at 14. On March 25, 2024, Salas timely filed objections to the PFRD. See Objections at 1. Having conducted a de novo review of the record and all parts of Magistrate Judge Martínez's PFRD to which Salas properly objects, the Court will adopt the PFRD and overrule the Objections.

**LAW REGARDING OBJECTIONS TO PROPOSED FINDINGS AND  
RECOMMENDATIONS**

District courts may refer dispositive motions to a Magistrate Judge for a recommended disposition. See Fed. R. Civ. P. 72(b)(1) (“A magistrate judge must promptly conduct the required proceedings when assigned, without the parties’ consent, to hear a pretrial matter dispositive of a claim or defense or a prisoner petition challenging the conditions of confinement.”). Rule 72(b)(2) governs objections: “Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.” Fed. R. Civ. P. 72(b)(2). Finally, when resolving objections to a Magistrate Judge’s proposal, “[t]he district judge must determine de novo any part of the Magistrate Judge’s disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.” Fed. R. Civ. P. 72(b)(3). Similarly, 28 U.S.C. § 636 provides:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1)(C).

“The filing of objections to a magistrate [judge]’s report enables the district judge to focus attention on those issues -- factual and legal -- that are at the heart of the parties’ dispute.” United States v. One Parcel of Real Prop., with Bldgs, Appurtenances, Improvements, & Contents, Known as: 2121 East 30th Street, Tulsa Okla., 73 F.3d 1057, 1059 (10th Cir. 1996) (“One Parcel”)(quoting Thomas v. Arn, 474 U.S. 140, 147 (1985)). As the United States Court of Appeals for the Tenth Circuit has noted, “the filing of objections advances the interests that underlie the Magistrate’s

Act[, 28 U.S.C. § 636 et seq.], including judicial efficiency.” One Parcel, 73 F.3d at 1059 (citing Niehaus v. Kan. Bar Ass’n, 793 F.2d 1159, 1165 (10th Cir. 1986)).

The Tenth Circuit has held “that a party’s objections to the magistrate judge’s report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.” One Parcel, 73 F.3d at 1060. “To further advance the policies behind the Magistrate’s Act, [the Tenth Circuit], like numerous other circuits, ha[s] adopted ‘a firm waiver rule’ that ‘provides that the failure to make timely objections to the magistrate’s findings or recommendations waives appellate review of both factual and legal questions.’” One Parcel, 73 F.3d at 1059 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir.1991)). “[O]nly an objection that is sufficiently specific to focus the district court’s attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate’s Act.” One Parcel, 73 F.3d at 1060. In addition to requiring specificity in objections, the Tenth Circuit has stated that “[i]ssues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.” Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996). See United States v. Garfinkle, 261 F.3d 1030, 1030-31 (10th Cir. 2001)(“In this circuit, theories raised for the first time in objections to the magistrate judge’s report are deemed waived.”). In an unpublished opinion, the Tenth Circuit has stated that “the district court correctly held that [a plaintiff] had waived [an] argument by failing to raise it before the magistrate.” Pevehouse v. Scibana, 229 F. App’x 795, 796 (10th Cir. 2007).<sup>1</sup>

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<sup>1</sup>Pevehouse v. Scibana is an unpublished Tenth Circuit opinion, but the Court can rely on an unpublished opinion to the extent its reasoned analysis is persuasive in the case before it. See 10th Cir. R. 32.1(A) (“Unpublished decisions are not precedential, but may be cited for their persuasive value.”). The Tenth Circuit has stated:

The Tenth Circuit has also noted, “however, that ‘[t]he waiver rule as a procedural bar need not be applied when the interests of justice so dictate.’” One Parcel, 73 F.3d at 1060 (quoting Moore v. United States, 950 F.2d 656, 659 (10th Cir. 1991)) (“We join those circuits that have declined to apply the waiver rule to a pro se litigant’s failure to object when the magistrate [judge]’s order does not apprise the pro se litigant of the consequences of a failure to object to findings and recommendations.”)). In One Parcel, the Tenth Circuit notes that the district judge decided sua sponte to conduct a de novo review despite the lack of specificity in the objections, but the Tenth Circuit held that it would deem the issues waived on appeal because such actions would advance the interests underlying the waiver rule. See 73 F.3d at 1060-61 (citing cases from other Courts of Appeals where district courts elected to address merits despite potential application of waiver rule, but Courts of Appeals opted to enforce waiver rule).

Where a party files timely and specific objections to the Magistrate Judge’s PFRD “on . . . dispositive motions, the statute calls for a de novo determination, not a de novo hearing.” United States v. Raddatz, 447 U.S. 667, 674 (1980) (“Raddatz”). The Tenth Circuit has stated that a de novo determination, pursuant to 28 U.S.C. § 636(b), “requires the district court to consider relevant evidence of record and not merely review the magistrate judge’s recommendation.” In re Griego, 64 F.3d 580, 583-84 (10th Cir. 1995). The Supreme Court of the United States has noted

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In this circuit, unpublished orders are not binding precedent, . . . [a]nd we have generally determined that citation to unpublished opinions is not favored. However, if an unpublished opinion or order and judgment has persuasive value with respect to a material issue in a case and would assist the court in its disposition, we allow a citation to that decision.

United States v. Austin, 426 F.3d 1266, 1274 (10th Cir. 2005). The Court concludes that Pevehouse v. Scibana has persuasive value with respect to a material issue and will assist the Court in its disposition of this Order.

that, although a district court must make a de novo determination of the objections to recommendations under 28 U.S.C. § 636(b)(1), the district court is not precluded from relying on the Magistrate Judge’s proposed findings and recommendations. See Raddatz, 447 U.S. at 676 (“[I]n providing for a ‘de novo determination’ rather than de novo hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate [judge]’s proposed findings and recommendations.”)(quoting 28 U.S.C. § 636(b)(1)). See Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla., 8 F.3d 722, 724-25 (10th Cir. 1993)(holding that the district court’s adoption of the Magistrate Judge’s “particular reasonable-hour estimates” is consistent with a de novo determination, because “the district court ‘may *accept*, reject, or modify, *in whole or in part*, the findings or recommendations made by the magistrate.’” (quoting 28 U.S.C. § 636(b)(1))(emphasis in Bratcher v. Bray-Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla.)).

Where no party objects to the Magistrate Judge’s proposed findings and recommended disposition, the Court has, as a matter of course in the past and in the interests of justice, reviewed the Magistrate Judge’s recommendations. In Workheiser v. City of Clovis, where the plaintiff failed to respond to the Magistrate Judge’s PFRD, although the Court determined that the plaintiff “has waived his opportunity for the Court to conduct review of the factual and legal findings in the [PFRD],” the Court nevertheless conducted such a review. No. CIV 12-0485, 2012 WL 6846401, at \*3 (D.N.M. December 28, 2012)(Browning, J.). The Court generally does not review, however, the Magistrate Judge’s PFRD de novo, and determine independently necessarily what it would do if the issues had come before the Court first, but rather adopts the PFRD where “[t]he Court cannot say that the Magistrate Judge’s recommendation . . . is

clearly erroneous, arbitrary, [obviously<sup>2</sup>] contrary to law, or an abuse of discretion.” Workheiser v. City of Clovis, 2012 WL 6846401, at \*3.

This review, which is deferential to the Magistrate Judge’s work when there is no objection, nonetheless provides some review in the interest of justice, and seems more consistent with the waiver rule’s intent than no review at all or a full-fledged review. Accordingly, the Court considers this standard of review appropriate. See Thomas v. Arn, 474 U.S. at 151 (“There is nothing in those Reports, however, that demonstrates an intent to require the district court to give any more consideration to the magistrate’s report than the court considers appropriate.”). The Court is reluctant to have no review at all if its name is going at the bottom of the order adopting the Magistrate Judge’s PFRD.

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<sup>2</sup>The Court previously used as the standard for review when a party does not object to the Magistrate Judge’s PFRD whether the recommendation was “clearly erroneous, arbitrary, contrary to law, or an abuse of discretion,” thus omitting “obviously” in front of contrary to law. Solomon v. Holder, No. CIV 12-1039, 2013 WL 499300, at \*4 (D.N.M. January 31, 2013)(Browning J.)(adopting the recommendation to which there was no objection, stating: “The Court determines that the PFRD is not clearly erroneous, arbitrary, contrary to law, or an abuse of discretion, and accordingly adopts the recommendations therein”); O’Neill v. Jaramillo, No. CIV 11-0858, 2013 WL 499521 (D.N.M. January 31, 2013)(Browning, J.)(“Having reviewed the PRFD under that standard, the Court cannot say that the Magistrate Judge’s recommendation is clearly erroneous, arbitrary, contrary to law, or an abuse of discretion. The Court thus adopts Judge Wormuth’s PFRD.”)(citing Workheiser v. City of Clovis, 2012 WL 6846401, at \*3); Galloway v. JP Morgan Chase & Co., No. CIV 12-0625, 2013 WL 503744 (D.N.M. January 31, 2013)(Browning, J.)(adopting the Magistrate Judge’s recommendations upon determining that they were not “clearly contrary to law, or an abuse of discretion.”). The Court concludes that “contrary to law” does not reflect accurately the deferential standard of review which the Court intends to use when there is no objection. Finding that a Magistrate Judge’s recommendation is contrary to law would require the Court to analyze the Magistrate Judge’s application of law to the facts or the Magistrate Judge’s delineation of the facts -- in other words performing a de novo review, which is required only when a party objects to the recommendations. The Court concludes that adding “obviously” better reflects that the Court is not performing a de novo review of the Magistrate Judges’ recommendations. Going forward, therefore, the Court will review, as it has done for some time now, Magistrate Judges’ recommendations to which there are no objections for whether the recommendations are clearly erroneous, arbitrary, obviously contrary to law, or an abuse of discretion.

### ANALYSIS

Pursuant to rule 72(b) of the Federal Rules of Civil Procedure, the Court has conducted a de novo review of the record and all parts of Magistrate Judge Martínez's PFRD to which Salas properly objects. After conducting a de novo review and having thoroughly considered the PFRD and Salas's objections, the Court concludes that the Objections are without sound basis. Salas' Objections provide lengthy rule statements regarding federal habeas law, but the Objections fail to address the primary basis upon which Judge Martínez founded the PFRD, namely, that Salas failed to satisfy the one-year statute of limitations that began to run in 2010. The Court agrees with Magistrate Judge Martínez' conclusion that the statute of limitations began running upon the Supreme Court of New Mexico's denial of Salas' certiorari petition challenging the Third Amended Judgment, Sentence and Commitment on the Mandate (dated September 4, 2009)("Third Amended Judgment"), in Third Set of Exhibits to Respondents' Answer at 1-5, filed February 13, 2023 (Doc. 13-3)("Third Set of Exhibits"). See Order at 1 (dated May 25, 2010), in Third Set of Exhibits at 46. The Third Amended Judgment represented the last time that New Mexico's State courts entered substantive, non-clerical changes to Salas' judgment, because the Third Amended Judgment determined that one of his counts of conviction was not a violent felony so as additionally to increase his sentence. See Third Amended Judgment at 1-5. Later, the Fourth Amended Judgment affected only the time-served credit calculation, and the Fifth Amended Judgment corrected only verbiage related to the sentence on one of the counts, but did not affect it substantively. See Fourth Amended Judgment, Sentence and Commitment on the Mandate (dated August 8, 2019)("Fourth Amended Judgment"), in Fourth Set of Exhibits to Respondents' Answer at 135-139, filed February 13, 2023 (Doc. 13-4)("Fourth Set of Exhibits"); Fifth Amended Judgment, Sentence and Commitment on the Mandate (dated August 30, 2019)("Fifth Amended

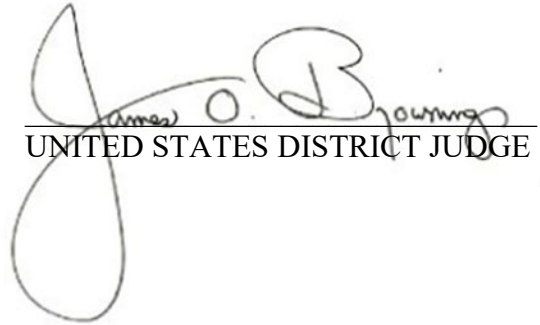
Judgment”), in Fourth Set of Exhibits at 148-152. The Court agrees with Magistrate Judge Martínez that neither the Fourth Amended Judgment nor the Fifth Amended Judgment effected substantive changes, so the Third Amended Judgment is the operative one for statute of limitations purposes. See 28 U.S.C. § 2244(d)(1)(A) (applying one-year statute of limitations running from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review”); Ezell v. Allbaugh, 777 F. App’x 271, 274 (10th Cir. 2019)(“[S]tate court’s correction of a clerical error’ is not a new judgment.” (quoting May v. Kansas, 562 F. App’x 644, 645-46 (10th Cir. 2014))). The Objections do not challenge specifically the conclusion that the Fourth Amended Judgment and Fifth Amended Judgment effected non-substantive changes, and the Court concludes that no reason either in law or in fact to depart from Magistrate Judge Martínez’s recommended disposition.

The Court also will deny a Certificate of Appealability. Rule 11 of the Rules Governing Section 2254 Cases states that “[t]he district court [must] . . . issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” R. Governing § 2254 Cases 11(a). A certificate may only issue “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make this showing, a petitioner must “demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). For the reasons stated in the PFRD, Salas has not demonstrated that the time-bar is debatable and the Court will deny a certificate of appealability.

**IT IS ORDERED** that: (i) the Magistrate Judge’s Proposed Findings and Recommended Disposition, filed January 31, 2024 (Doc. 25), is adopted; (ii) the Petitioner’s Objections to Proposed Findings and Recommended Disposition, filed March 25, 2024 (Doc. 29), are overruled;



(iii) the Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1), is dismissed with prejudice; and (iv) a certificate of appealability is denied.



UNITED STATES DISTRICT JUDGE

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